

**ALABAMA DEPARTMENT OF REVENUE
REVENUE RULING 02-002**

This document may not be used or cited as precedent. Code of Ala. 1975, §40-2A-5(a).

TO:

FROM: Commissioner of Revenue
 Alabama Department of Revenue

DATE: July 3, 2002

RE: The sale of personal television services, as described herein, to
 purchasers through subscriptions are non-taxable services in
 Alabama.

Dear Sir:

Your clients are planning to offer personal television services to subscribers located in Alabama. Your client's personal television service will allow viewers to do the following:

1. Automatically record television shows and watch them at a later time.
2. Pause or record live television broadcasts.
3. Create personalized programming based upon the viewer's previous viewing patterns.
4. Receive special data and video content.

In order for a subscriber to obtain your client's personal television service, a subscriber must purchase or have access to the following:

1. A Personal Video Recorder ("PVR") or Direct-to-Home Satellite Television Combo Box ("DSCB"), purchased from an unrelated third party retailer.
2. Television service via cable, satellite, or antenna.
3. A telephone line connected to the PVR's built-in modem or DSCB modem.
4. A current paid subscription to Your client's personal television service.

ISSUES

In your request for a Revenue Ruling you have asked for the Alabama Department of Revenue's position concerning the following issues:

1. What is Alabama's sales & use, telecommunications, and/or other gross receipts tax treatment of your client's sale of personal television services to customers located in Alabama as described in the statement of facts as presented?
2. In some instances your client may offer personal television services in conjunction with other taxable and non-taxable services. Specifically, your client may advertise a suite of services at one price point (i.e. PVR Service and Direct-to-Home Satellite Service), and using their billing system, separately calculate and apply the taxability to each unique component of the suite of services. Billing to the customer may be presented in one line item in the finished invoice. In some instances, customers may only have access to an electronic invoice via the Internet. Will this billing approach make any difference to the taxability of your client's service?
3. When personal television services are provided by a direct-to-home satellite provider, are the fees collected from subscribers exempt from local taxation under section 602 of the Federal Telecommunications Act?
4. Will any of the future services, as noted above, change the taxability of your client's personal television service?
5. Are there any other state and or local taxes that may apply to your client's services?

FACTS

In order for a subscriber to subscribe to your client's personal television service, the subscriber must first purchase a PVR or DSCB. PVRs and DSCBs are available for purchase through unrelated third party retailers and consist of a set-top unit and remote control. The sales tax on the sale of the units will be collected by retailers at the point of sale, where applicable. The manufacture and sale of PVRs and DSCBs have been licensed to independent third -party consumer electronics manufacturers. DSCBs have the same capabilities as

PVRs, but are integrated to allow the viewer to use your client's personal television service as well as receive direct-to-home satellite television programming. In all other aspects, PVRs and DSCBs are generally the same. Henceforth, both types of units will be referred to as PVRs.

PVRs come equipped with certain basic "out-of-the-box" features. The basic features of PVRs are similar to video cassette recorders ("VCRs") in nature except that they permit VCR-like recording capabilities onto a built-in hard drive as opposed to recording onto videocassettes. PVRs also provide viewers with several basic capabilities including: pause, rewind and fast forward navigation of live or recorded television and the ability to record selected programs by manually programming the PVR. PVRs have the capability to receive cable, satellite, and off-air television programming. These capabilities exist independently of the personal television service provided by your client.

As noted above, your client will offer enhancements to the inherent PVR capabilities to customers interested in subscribing to Your client's personal television service. However, customers purchasing PVR hardware are not obligated to subscribe to your client's service. Essentially, a customer could purchase PVR hardware and connect it to their television source without activating your client's programming and still receive a basic form of functionality from the PVR hardware. In order for a subscriber to receive your client's services, the subscriber must pay a subscription fee directly to your client (in the case of a subscription obtained through another company, the fee for your client's service will be paid to other company per its invoice). The subscription fee is separate and distinct from the original purchase of the PVR from the unrelated third party retailer and is separately billed and collected by either other company or your client. This fee is distinct from any fee paid for cable or direct-to-home satellite television programming services.

Subscribers may subscribe to your client's personal television service in one of three subscription methods: (1) lifetime subscriptions (i.e. a one-time payment); (2) annual subscriptions (i.e. an annual payment); or (3) monthly subscriptions (i.e. a monthly payment).

In consideration of the subscription fees, your client will provide the following services:

1. Electronic Program Guides – The Electronic Programming Guides are delivered electronically on a nightly basis and stored on the hard drive of the subscriber's PVR. The Electronic Programming Guide contains approximately two weeks of television programming schedules and allows the customer to identify and schedule future recordings. The Electronic

Programming Guide also contains program information that allows the subscriber to rate programs (using a “thumbs up” or “thumbs down” feature on the remote control), thus identifying a subscriber’s preference for specific programming. From these ratings, your client’s personal television service will suggest similar television programming that the subscriber may enjoy.

2. Specialized Electronic Television Viewing Guides – The Specialized Electronic Television Viewing Guides differ from the Electronic Programming Guide in that they offer enhanced graphics and formats. The subscriber can access the downloaded programming guides via their PVR and browse them for upcoming television programs. Once the subscriber identifies an upcoming program that he/she wishes to view, the subscriber can record the selected program for later viewing. The specialized viewing guides are also delivered electronically on a nightly basis and stored on the hard drive of the subscriber’s PVR.

As part of the personal television service, your client will provide two types of specialized electronic television viewing guides:

- An electronic magazine that organizes upcoming television and programming by topic (e.g. comedy, sports, drama and special events).
 - Network Showcases organized by topic and sorted by separate networks (e.g. NBC, CBS, HBO).
3. Programming Content Specifically Created By Your Client – As part of the subscription to the personal television service, your client will provide several television programs including a weekly half hour preview show. The preview show will offer commentary and viewing suggestions of selected upcoming programming. This service is delivered via broadcast networks during off-peak hours and is recorded on the hard drive of the subscriber’s PVR. The subscriber can view or delete this programming from his/her PVR at any time.

Delivery of the of the Electronic Programming and Specialized Electronic Television Viewing Guides is accomplished via telephone modem connection originated by the subscriber’s PVR to your client’s Operation Facility located outside of Alabama. The Operation Facility consists of a series of computer servers that store and transmit your client’s information and services to subscribers. The electronic transmissions are also delivered without the transfer of any tangible personal property.

Once your client's Operation Facility verifies that the customer is a valid subscriber, the Electronic Program Guide, Electronic Content and Viewing Guides are electronically downloaded onto the hard drive of the subscriber's PVR. In some instances, updates to the PVR's operating system will also be downloaded during this time. In addition to the electronic transmissions, the Electronic Program Guide, Electronic Content and Viewing Guides may also be transmitted to the subscriber's PVR via DirecTV's direct-to-home satellite transmission or other electronic media. In all instances the Electronic Program Guide, Electronic Content and Viewing Guides are delivered electronically and not by the use of diskettes, CD-Rom or other tangible mediums.

Future Services and Revenue

In the future, your client may provide enhanced services via modem, digital subscriber line (DSL), satellite or other high-speed connection.

In addition, your client may receive additional revenues from the following:

1. Targeted advertising
2. Promotional content programming.
3. Select and purchase products promoted in specialized programming.
4. Delivery of premium programming such as music, games, and motion pictures ordered by a subscriber and delivered and stored on the hard drive of subscriber's PVR. A separately stated fee may be charged for the premium programming.
5. The sale of audience research and measurement.

Billing Procedures

Subscriber's can subscribe to your client's personal television service in the following ways:

1. Customers may contact your client via a toll free number or may subscribe to the service via the World Wide Web.
2. If the subscriber purchases a DSCB, the subscriber can sign up for service by contacting his/her direct-to-home satellite provider using a toll free number or via the World Wide Web. The subscription fee for your client's personal television service fee may be separately stated on the subscriber's invoice, or included as a component of a premium suite of services.

ANALYSIS OF ALABAMA LAW

Overview

Alabama's sales and use tax is a privilege or license tax imposed upon gross receipts derived from renting or making retail sales of tangible personal property (Code of Alabama "Code" §§ 40-12-222; 40-23-2(1)). With the exception of amusement and entertainment services, service transactions are generally not subject to sales and use tax (See, Code § 40-23-2). Services made specifically taxable include: amusement devices, amusement parks, athletic contests, theaters, or any other place at which any exhibition, display, amusement, or entertainment is offered to the public (Id.).

Your client's personal television service is not an amusement or entertainment service as described under Alabama law. Based upon an analysis of Alabama's laws, regulations and revenue rulings, the purchase of a subscription for personal television services are non-taxable services in Alabama. Accordingly, the furnishing of personal television services by your client to subscribers in Alabama by the aforementioned methods would not be subject to Alabama sales tax.

Since personal television services do not expressly fall within any specific taxable classification, we have analyzed several different tax classifications and provided our conclusions for each classification.

Information Services

Information service provided electronically to subscribers using satellite technology is not considered to be tangible personal property for purposes of the Alabama sales tax statutes and is therefore not subject to sales and use tax because the essence of the service is the transfer of nontaxable information (Revenue Ruling No. 94-002, Alabama Department of Revenue, October 5, 1994).

Your client's personal television service is an information service provided by telephone modem and satellite technology. Specifically, personal television services involve the provision of electronic viewing guides and network showcases over telephone modem lines, via satellite and other electronic means to Alabama subscribers. A subscriber's PVR will originate a call via telephone modem to your client's servers to download information to the subscriber's PVR

for subsequent viewing. The guides contain approximately two weeks of television programming schedules and allow subscribers to identify and schedule future recordings and rate programs so that your client's service may suggest similar television programming that the subscriber may enjoy.

Personal television service also includes an electronic magazine and network showcases that organize upcoming television programming by topic and network. All of the services are transmitted electronically via telephone modem or satellite from your client's servers located outside of Alabama and no tangible personal property is transferred as part of the service. Since the essence of the personal television service is the transfer of nontaxable information and is transmitted via satellite technology and telephone modem, such service is not subject to Alabama sales and use tax.

Cable and Satellite Television

Satellite and cable television services are not subject to sales or use tax because the signal transmitted is not tangible personal property (See, Revenue Ruling No. 95-011, Alabama Department of Revenue, January 31, 1996).

Your client does not offer cable television services in Alabama. As discussed, your client's personal television service provides program guides and viewing suggestions of television programs and cable television services. As part of the subscription to the personal television service, Your client will also provide several television programs including a weekly half hour preview show offering commentary and viewing suggestions of upcoming programming delivered via broadcast networks, satellite transmission and telephone wire and is recorded on the hard drive of the subscriber's PVR. The subscriber may delete any part of the service downloaded to them at any time.

While the service is delivered via telephone modem and satellite transmission, Your client does not provide access to any basic network channels, premium channels, pay per view movies, sporting events, etc., commonly found with cable service providers, nor is the subscription fee based on access to such channels. Consequently, your client's personal television services are not deemed to be a cable service because the delivery and storage aspects are variedly dissimilar from cable television systems. If anything, personal television services are more analogous to an information service as described above. Nevertheless, if personal television services are deemed to be a cable service, they are still non-taxable because cable services are exempt from sales and use tax in Alabama.

Computer Software

Computer software, to the extent that it is tangible personal property, is subject to Alabama sales and use tax. Canned computer software is tangible personal property and includes software programs prepared, held, or existing for general or repeated use. Canned software includes all software except custom software programming, regardless of its function and regardless of whether it is transferred to the purchaser in physical form, via telephone lines, or by another alternative form of transmission (Alabama Regulation, 810-6-1-.37).

Your client does not sell canned computer software, they sell personal television services such as electronic viewing guides and preferences, an electronic magazine and network showcases that are enabled by software. Though personal television services are transmitted by telephone modem, satellite or other electronic means, its function is to deliver program information, not software. Under no circumstance will any storage medium such as diskettes or CD ROMs be transferred to subscribers as part of the transaction. Additionally, any software updates transmitted to a subscriber is transferred only as an incidental part of the provision of personal television services and no tangible personal property is exchanged. Since your client is not selling or transferring canned software and the true object of the sale is a personal television service, your client is not selling software subject to sales tax in Alabama.

Telecommunications

In accordance with Alabama's practice of primarily taxing retail sales of tangible personal property and amusement and entertainment services, telecommunications and telephone services are not subject to tax (See, Code § 40-23-2). The term "telephone services" includes transmission by or through any media such as wire, cables, microwaves, light waves or any combination of those or similar media (Code § 40-21-80).

Your client's personal television services deliver electronic programming guides and specialized content to subscribers using telephone wires, direct-to-home satellite transmissions or other electronic media. However, your client uses telecommunications services as a means of delivery of its services (e.g. via telephone modem) and is not a provider of such services. Thus, telephone services are incidental to the actual provision of personal television services.

While a subscriber's PVR will originate a call via telephone modem to your client's servers to download information, a subscriber must already have independent telephone service in order to make the call, and telephony services are not provided by Your client. For these reasons, the personal television service is not a telecommunication or telephone service.

Local Taxation Preemption with respect to Direct-To-Home Services

In some instances, your client's personal television service may be transmitted via satellite by a provider of direct-to-home satellite services. In such instances, the direct-to-home satellite service provider purchases your client's service for resale and sells the service to its customers. When your client's personal television service is resold by a direct-to-home satellite service provider, the fee charged for the service is exempt from local taxation under Section 602 of the 1996 Federal Telecommunications Act.

Section 602 of the Federal Telecommunications Act of 1996 exempts a provider of direct-to-home satellite service from the collection or remittance, or both, of any tax or fee imposed by any local tax jurisdiction on direct-to-home-satellite service. The intent behind the Telecommunications Act is to remove the tax collecting burden of multiple local taxes from direct-to-home satellite providers and expanding technologies. The statute defines a "provider of direct-to-home-services" as a person who transmits, broadcasts, sells, or distributes direct-to-home satellite service. The term "direct-to-home service" is defined as programming transmitted or broadcast by satellite directly to the subscribers' premises without the use of ground receiving or distribution equipment, except at the subscribers' premises or in the uplink process to the satellite.

Your client's personal television service falls within the definition of "direct-to-home service" since it consists of programming guides and programming that is transmitted by satellite directly to the subscribers' premises. Accordingly, the fees charged to subscribers for personal television services by a direct-to-home service provider are exempt from local taxation, including the local option sales taxes.

CONCLUSION

Based upon an analysis of Alabama's laws, regulations and revenue rulings, it is the position of the Department of Revenue that the purchase of personal television services from your client is for non-taxable services in Alabama. Accordingly, the furnishing of personal television services by your client to

subscribers in Alabama by the aforementioned methods would not be subject to Alabama sales tax.

Cynthia Underwood,
Commissioner, Alabama
Department of Revenue

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